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No. ____

IN THE

Supreme Court of the United States

DAQRIC B. MOOREFIELD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a former judge who presided over the criminal trial of a defendant may later prosecute the same defendant?

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PETITION FOR A WRIT OF CERTIORARI

Daqric B. Moorefield, a member of the United States Marine Corps, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (CAAF) is published at 66 M.J. 170 and reprinted in the Appendix at 1a-4a. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) is reprinted at 5a-10a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1259(3), which permits review of "cases in which the Court of Appeals for the Armed Forces granted a petition for review." The CAAF granted review of Moorefield's petition for review on November 16, 2007, and issued a decision on April 1, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, clause 14 of the United States Constitution vests Congress the authority "To make Rules for the Government and Regulation of the land and naval forces."

The Fifth Amendment to the U.S. Constitution reads: "No person shall be ... deprived of life, liberty, or property, without due process of law ...."

The Fourteenth Amendment to the U.S. Constitution reads: "No State shall deprive any person of life, liberty, or property, without due process of law ..."

10 U.S.C. § 806 (Art. 6, UCMJ), confers a special status on the Staff Judge Advocate (SJA) as legal advisor, both in terms of his or her relationship with the convening authority (CA) and within the chain of command.

28 U.S.C. § 455 (2000), (Disqualification of justice, judge, or magistrate judge): "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Section 455(b) lists a number of additional circumstances in which a judge must recuse himself, including "[w]here he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding." § 455(b)(1).

A Navy Regulation that essentially incorporates the ABA *Model Rules of Professional Conduct* is Dep't of the Navy, Judge Advocate General Instr. 5803.1B, Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General, Rule 1.12 (Feb. 11, 2000)(Former Judge or Arbitrator):

> a. ...[A] covered USG attorney shall not represent anyone in connection with a matter in which the covered USG attorney participated personally or substantially as a judge or other administrative officer, arbitrator, or law clerk to such person, unless all parties to the proceeding consent after disclosure.

STATEMENT OF THE CASE

This case presents one of the most interesting and important conflict of interest scenarios this Court has seen: a former judge who later participated in the prosecution of a defendant who previously appeared before him. The question before this Court is whether a former judge can switch roles like this.

The case is about the integrity of the criminal justice system; it is not about the personal integrity of the man at the center of this controversy. Even lawyers make mistakes.

There is every reason to believe that Marine Colonel (Col.) Ralph A. Kohlmann is a fine lawyer. He has extensive experience as a military judge and he has served honorably as a SJA. He even wrote a provocative article challenging the wisdom of military commissions.

And, ironically, to demonstrate the faith that our national leadership has in Col. Kohlmann's legal skills, in March 2007, the Office of Military Commissions appointed him to serve as the chief judge of the military commissions presiding over the trials of terrorism suspects at the naval base in Guantánamo Bay, Cuba.[1]

But Col. Kohlmann also makes mistakes. He is human. Col. Kohlmann made a mistake when he provided a recommendation to prosecute Sergeant Moorefield. He also made a mistake when he later recommended that Moorefield's conviction and sentence be approved. Col. Kohlmann could have easily avoided these mistakes by recusing himself

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[1] William Glaberson, "From a Critic of Tribunals to Top Judge," *New York Times*, December 13, 2007.

from any involvement in Moorefield's case. But he did not.

A. Facts

In 1999, Col. Kohlmann presided over a fully-contested, five-day, criminal trial, where the members of a military jury acquitted Moorefield of assaulting his girlfriend.

During this trial, Moorefield's defense counsel made several motions regarding discovery, privileges, and about testimony from the alleged victims. Col. Kohlmann reviewed these sensitive matters, including the investigation files. Because Moorefield was acquitted, the government did not produce a verbatim record of trial.[2]

Five years later, when Col. Kohlmann, then a former judge, served as SJA, he learned that Moorefield faced similar charges of assaulting his girlfriends. Even though Col. Kohlmann was the former judge who presided over Moorefield's previous criminal trial, he did not formally disclose his prior involvement to anybody, nor did he recuse himself from involvement in what would become Moorefield's second criminal trial.

Instead, Col. Kohlmann got involved. Besides recommending that Moorefield be tried at the felony level – at a general court-martial, he also insisted during pretrial negotiations that Moorefield serve at least ten-years in prison. Because the military does not have a system of random jury selection,[3] Col.

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[2] *See*, RCM 1103(e), M.C.M.; *United States v. Tyndale*, 56 MJ 209 (C.A.A.F. 2001), fn.1.

[3] *See, United States v. Dowty*, 60 M.J. 163 (C.A.A.F. 2004).

Kohlmann assisted his CA in selecting the officer and enlisted members of Moorefield's military jury.

Moorefield did not challenge Col. Kohlmann because Col. Kohlmann did not formally disclose his prior role as the judge at Moorefield's first trial. Moorefield did not know that Col. Kohlmann was the person, from Moorefield's viewpoint, "behind the scenes," making recommendations and conducting pretrial negotiations. Moorefield never had a face-to-face meeting with Col. Kohlmann.

This jury, which Col. Kohlmann helped construct, convicted Moorefield and sentenced him to two years of confinement.

Contrary to his pleas, the military jury convicted Moorefield of disrespect, false official statement, six specifications of assault and battery, soliciting obstruction of justice, making a threat, impersonating a noncommissioned officer, and disorderly conduct, in violation of Articles 91, 107, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 907, 928, and 934. Besides two years of confinement, the jury also sentenced Moorefield to forfeit all pay and allowances, reduced him to pay grade E-1, and adjudged him a bad-conduct discharge.

On Col. Kohlmann's last day of duty as SJA, he recommended that Moorefield's adjudged sentence be approved. The commander complied with Col. Kohlmann's parting recommendation.

Moorefield then waited for almost two years for his case to be docketed at the Navy-Marine Corps Court of Criminal Appeals (NMCCA), a court consisting of senior uniformed Navy and Marine Corps lawyers. During this period of posttrial appellate delay, a lingering problem in the military

justice system,[4] the government destroyed the audiotapes of Moorefield's 1999 trial.

B. Proceedings Below

At NMCCA, Moorefield challenged: (i) the lengthy post-trial delay of his appeal; and (ii) the failure of Col. Kohlmann, as his prior judge, to recuse himself. Moorefield argued that Col. Kohlmann should have recused himself from recommending that Moorefield be prosecuted, from recommending that Moorefield's findings and sentence be approved, and from otherwise participating in Moorefield's prosecution.

In its unpublished opinion, NMCCA held that the posttrial delay was harmless beyond a reasonable doubt. *App.* 8a. The court condemned Moorefield's claims, which he submitted via affidavit, that Col. Kohlmann had learned sensitive details about him during the first trial and that some court sessions, presumably the pretrial motions, were "non-public."[5] NMCCA determined that a former judge is not required to recuse himself from recommending a later prosecution of the same defendant, nor is a former judge prohibited from participating in that defendant's later prosecution as SJA. *Id.* at 10a.

Moorefield then appealed to the CAAF, where that Court granted review on November 16, 2007. In its April 1, 2008, decision, the CAAF held that Col. Kohlmann's subsequent recommendation to pros-

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[4] *See, United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

[5] *App.* 10a, fn1. Moorefield's claim before NMCCA that these pretrial sessions, including those in judge's chambers, were "non-public," was only true in the sense that these sessions were not witnessed, literally, by the public. But the statement wrongly implied that the sessions were "closed." They were not.

ecute Moorefield and the recommendation to approve his findings and sentence was permissible because the two cases or matters were not the "same." *App.* at 4a.

The CAAF focused on technical military rules such as R.C.M. 1106 and JAGINST 5803.1B, Rule 1.12, rather than relying on precedent or broader jurisprudence. *Id.* at 3a-4a.

The CAAF held that Article 6, UCMJ, did not require recusal. *Id.* at 3a-4a. The CAAF also stated that 28 U.S.C. § 455 (2000), which pertains to the disqualification of federal justices, judges, and magistrates as defined in 28 U.S.C. § 451 (2000), if it extended to an SJA, did not require Col. Kohlmann to disqualify himself. *Id.* at 4a.,fn2.

Most pointedly, the CAAF relied on Moorefield's failure to identify any "specialized knowledge" that Col. Kohlmann acquired during Moorefield's first trial or any prejudice that resulted when he converted from judge to prosecutor in the second. *Id.* at 4a, 5a. The CAAF focused on Moorefield's failure to prove "specialized knowledge" or prejudice despite Col. Kohlmann's failure to formally disclose his prior role as judge. Such disclosure would have permitted an evidentiary hearing to elicit such facts. The CAAF did not cite any of this Court's transcript holdings.[6] CAAF faulted Moorefield for failing to substantiate his claims; it did not address Col. Kohlmann's failure to disclose or the government's destruction of tapes.

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[6] *See, e.g., Mayer v. City of Chicago*, 404 U.S. 189, 195 (1971). (when a defendant's grounds for appeal make out a colorable need for a complete transcript, the government has the burden of producing the transcript or a sufficient "alternative.")

REASONS FOR GRANTING THE PETITION

This Court should grant Moorefield's petition for a writ of certiorari for three reasons.

First, when a judge presides over the criminal trial of a defendant, this Court should hold that the former judge may not switch roles and participate in a later prosecution of the same defendant. This Court should reach this holding to preserve the integrity of the criminal justice system.

Second, the CAAF decided an important federal question regarding a defendant's due process right to transcripts in a way that conflicts with the decisions of this Court. This Court should uphold its precedents that a defendant may access transcripts from his first trial if it affects his second trial. The government violated this right when it destroyed the audio-tapes of Moorefield's first trial.

Third, this Court should resolve a conflict among the courts of appeals over the definition of "matter," and the conflict over how and when to apply the "substantial relationship" test. The "substantial relationship" test has national importance because it is the primary way that American courts, when confronted with a potential conflict of interest, compare prior and subsequent legal work. The "substantial relationship" test is also critical to resolve Moorefield's case

Col. Kohlmann's prior legal work must be compared with his subsequent legal work in order to resolve this case. His prior role as a judge must be compared with his later role as an SJA, performing many of a prosecutor's central functions.

This case is similar to *Liteky v. United States*, 510 U. S. 540 (1994). In that case, this Court permitted a

judge who presided over Father Bourgeois' 1983 bench trial to later preside, again, as the judge over his 1991 trial. This Court determined that the judge's minor annoyances with Father Bourgeois during his first trial did not amount to bias or rise to a level requiring recusal from the second.

But Moorefield's case is different from *Liteky* in one key respect. The judge who sat at Father Bourgeois' 1983 bench trial could not later *prosecute* Father Bourgeois in 1991. While testing for a judge's bias is a matter of degree, *switching positions* is a matter of kind.

Col. Kohlmann switched positions. This is forbidden.

There are thousands of part-time judges and former judges in the United States. This case is important because it will govern their conduct. More critical, *all* lawyers must have clear guidance on how to compare prior and new legal work. These issues have national importance beyond Moorefield's case.

Because Moorefield's trial and appeal were structurally tainted, he asks this Court to reverse his conviction.

I. A Former Judge Who Presides Over The Criminal Trial of a Defendant Should Not Be Permitted to Later Prosecute the Same Defendant.

Moorefield's trial was contaminated by Col. Kohlmann's improper recommendation to prosecute him.[7] Moorefield's case was also tainted by Col.

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[7] This recommendation to the CA is known in the military as providing Article 34, UCMJ, advice.

Kohlmann's improper recommendation to approve his findings and sentence.

This Court should protect the integrity of the criminal justice system by reversing Moorefield's conviction. This Court should authorize a new hearing of Moorefield. The new hearing may only proceed after a new SJA's recommendation to prosecute him; and if necessary, must receive a new posttrial recommendation, from a different and unconflicted SJA.[8]

By reversing Moorefield's conviction, this Court will prevent any confusion about the difference between a judge and a prosecutor. A judge should be independent. A prosecutor should be a partisan for the government. But this Court should prohibit lawyers from playing "musical chairs" in American courtrooms by switching positions.

The CAAF's decision is a far departure from the accepted and usual course of handling conflict of interest proceedings. No court has permitted a former judge to later work, as a lawyer, on matters that he worked on "personally and substantially" during the judgeship – especially not the criminal prosecution of a defendant. Until now.

The courts of appeals and state courts uniformly prohibit lawyers from participating in litigation involving a former party when they were "personally and substantially" involved with a party from the former proceeding. The CAAF ignored the routine

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[8] No sentence imposed becomes final until it is approved by the officer who convened the court martial. Art. 60, UCMJ, 10 U.S.C. § 860; Convening officers have the authority to review and modify the sentence imposed by courts martial. Art. 60, UCMJ, 10 U.S.C. § 860. The SJA's recommendations are key.

reversals in similar cases. These other courts are quite willing to remand a case to preserve the integrity of the criminal justice system. *See, State v. Tate*, 925 S.W. 2d 548 (Tenn.Crim.App. 1995).

Counter Arguments

Possible objections to Moorefield's petition include that (1) an SJA is not, *per se*, a "prosecutor"; (2) the military is different; (3) the defense had "constructive notice" of Col. Kohlmann's prior role as judge; (4) the "substantial relationship" test does not arise when no confidences are shared; (5) bias is not disqualifying unless it stems from an "extrajudicial source"; and (6) negative opinions do not constitute bias.

None of these objections are strong. Moorefield briefly rejoins each; his argument follows.

First, an SJA is a prosecutor. An SJA is even more powerful than a prosecutor and performs essential prosecutor functions. While an SJA does not argue the government's case in the courtroom, he or she "engineers" the court-martial. An SJA plays an instrumental role in determining whether or not the accused will be prosecuted; which charges shall go forward; the type of court-martial the accused will face; and, when negotiating a pre-trial agreement, what sentence is acceptable. The SJA works closely with military prosecutors and, relative to a particular court-martial, acts in a quasi-supervisory role over the prosecutors. The SJA represents the government's interests, via the CA, and is an agent of the government. The SJA is a prosecutor.

Second, the military is not sufficiently different to justify a different reading of Rule 1.12. Military law is not distinct from civilian law in regard to Rule

1.12. Successive courts-martial of the same accused are extremely rare. And Rule 1.12 affects only the small community of military judges (usually less than 100 at any one time in a military of about 1.5 million active-duty servicemembers). Rule 1.12 applies in a strictly legal context; it does not apply to the general military population and bears no relation to military life or military operations.

Third, there was no notice in this case. Moorefield did not know that Col. Kohlmann was the SJA. He never saw him. Col. Kohlmann did not comply with the disclosure requirements of Rule 1.12. Just because Col. Kohlmann's *name* appeared on two trial documents[9], does not mean that the defense was responsible for figuring out that he was conflicted as Moorefield's former judge. There is no "constructive notice" component of Rule 1.12.

Fourth, the "substantial relationship" test is not triggered only when confidences are first shared. The "substantial relationship" test, whether by that name, or in principle, underlies *all* conflict of interest questions. Courts have not required a showing that confidences were shared before disqualifying counsel.

Fifth, a judge loses the protections of the "extrajudicial source rule" when he or she no longer sits as a judge. For example, an ordinary factfinder – a juror – is incompetent to serve when they had previously tried the same defendant.[10] A former

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[9] AE 7, Results of Trial; and Article 32 report.

[10] *See*, 16 R.C.L. § 78: "...a juror is disqualified where he served as a juror on a former trial, even if the case is not the same, it being sufficient to disqualify if only the issues and the defendant are the same"; *Virginia Law Review*, "Competency of Jurors to Serve When They Had Previously Tried Another Defendant Involved in the Same Transaction," Vol. 17, No. 6

judge, now a citizen, sits in the same place as these disqualified jurors.

Finally, negative opinions *do* constitute impermissible bias if they are derived from specific prior acts. If Col. Kohlmann, acting outside the protections of judicial office, based a prosecutorial decision on his negative view of Moorefield's character, the decision represents impermissible bias. In general, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." FED. R. EVID. 404(a). This rule does not require a showing of prejudice; there is no requirement that the factfinder actually relied on the pertinent character trait in determining guilt. The prejudice is presumed.

But Col. Kohlmann's decision to prosecute Moorefield, itself, may have rested on his opinion that Moorefield had a bad character. This kind of global judgment to prosecute is *worse* than a particular character judgment made during a trial.

Similarly, Col. Kohlmann knew of Moorefield's specific prior acts. Such prior acts are not admissible at trial, either. FED. R. EVID. 405(b) limits the use of specific prior acts to cases where character is

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(Apr., 1931), pp. 616-617; See also *Curtis v. State*, 118 Ala. 125, 24 So. 111 (Ala. 1897); *Garthwaite v. Tatum*, 21 Ark. 336, 76 Am. Dec. 402 (Ark. 1918); *Newton v. State*, 35 Ga. App. 515, 133 S.E. 649 (Ga. 1930); *Goshen v. England*, 119 Ind. 368, 21 N.E. 977 (Ind. 1889); *People v. Mol*, 137 Mich. 692, 100 N.W. 913 (Mich. 1904); *Stephens v. State*, 53 N.J.L. 245, 21 Atl. 1038 (N.J. 1891); *Gilmore v. State*, 37 Tex. Crim. Rep. 81 S.W. 787 (Tex. 1920); *Newby v. Harrell*, 99 N.C. 149, 5 S.E. 284 (N.C. 1888); 38 *Hays v. State*, 71 Okla. Cr. 59, 108 P.2d 187 (Okla. 1940); *French v. State*, 85 Wis. 400, 55 N.W. 555 (Wis. 1920).

at issue "in the strict sense" because that method of proof "possesses the greatest capacity to arouse prejudice..." Rule 405 advisory comm. notes.

These objections are further addressed below. Col. Kohlmann should have recused himself.

A. NAVY REGULATIONS REQUIRED COL. KOHLMANN TO RECUSE HIMSELF.

JAGINST 5803.B, Rule 1.12 required Col. Kohlmann, as a former judge, to disclose his prior role and to recuse himself as SJA. Col. Kohlmann represented the CA,[11] and derivatively, the United States, as its lawyer, switching roles to become one of Moorefield's adversaries.

Rule 1.12 applied to Col. Kohlmann. He had participated "personally and substantially" in Moorefield's first trial as judge. He sat as judge for a week-long, fully contested trial, including pretrial motions. The judge's role in overseeing a trial is a substantial duty.[12] Full acquittals are very rare in

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[11] Art. 22, UCMJ, 10 U.S.C. § 822 (2000). Congress, through the UCMJ, specifies which commanders possess the authority to convene a court-martial on behalf of the United States. A commander who possesses the authority to convene a court-martial on behalf of the United States is a CA. When a CA decides whether or not a case should be pros-ecuted, he exercises prosecutorial discretion, officially representing, and binding, the United States. When the CA so acts, he represents the United States, and his decisions are binding on it, similar to the decisions and actions of a U.S. Attorney. When a CA approves the findings and sentence, he also officially represents the United States by limiting the scope of review of the appellate courts to only that which is approved. *See* Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (2000).

[12] *See United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006) (the military judge has affirmative responsibilities to avoid the

the military. Col. Kohlmann would have remembered this case.

Col. Kohlmann violated Rule 1.12. Moorefield did not consent for him to remain on his case. If the military judge had known of Col. Kohlmann's prior role, he could have ordered a hearing on the matter or independently disqualified him as SJA.

All other jurisdictions have interpreted the Model Rules in a way that would require Col. Kohlmann to recuse himself. *Infra.*

Every American court reviews cases with care if a former judge was previously involved with a current party. Typical is *Marxe v. Marxe,*[13] where the New Jersey court noted that it would be improper for a former judicial *clerk* who had assisted a judge during her clerkship in evaluating several motions in a matrimonial case, even though she had not participated "substantially" in the matter within the meaning of RPC 1.12(a).[14] The *Marxe* court's approach was correct. But this Court should not allow higher standards for lawyers in civil divorce cases than for the lawyers in criminal prosecutions.

Besides violating the plain meaning of Rule 1.12, Col. Kohlmann violated the principles underlying the rule when he refused to recuse himself. Here, Moorefield urges this Court to adopt a clear, consistent reading of the Model Rules. The rules governing attorney conflicts of interest rest on the same

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appearance of evil in his courtroom and to foster public confidence in court-martial proceedings).

[13] 238 N.J. Super. 490 (Ch. Div. 1989).

[14] While the former clerk could not herself work on the new matter, the court did not disqualify her firm because it had set up a "Chinese wall" to screen the former clerk from any involvement in the case.

principles and thus should be interpreted uniformly. Even though the phrase "substantially related" does not appear in *every* conflict of interest rule, it is the guiding theme in all conflict rules: is the prior legal work "substantially related" to the current legal work such that it creates a conflict of interest?

This Court should reject the notion that "matter" means one thing in Rule 1.9, but another thing in Rules 1.11 and 1.12.[15] This kind of strained reading violates plain meaning. It is a well-settled rule of statutory construction that all parts of a statute should be construed together. One term may not have a different meaning in the same text. For example, Justice Frankfurter applied the rule of textual consistency to the constitution: "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring)

Since Rule 1.9, 1.11 and 1.12 deal with the same concerns, they should be interpreted consistently. Rule 1.9 provides: "A lawyer who has formerly represented a client in a *matter* shall not thereafter (1) represent another person in the same or a

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[15] Compare Annotated Model Rules of Professional Conduct, 2004, comment on Rule 1.9 [10] "In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed"; with Rule 1.11(e), "As used in this Rule, the term 'matter' includes: (1) any judicial or other proceeding, application, request for a ruling, or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties."

substantially related matter in which the person's interests are materially adverse to the interests of the client..."

The CAAF erred by choosing the narrowest definition of "matter," and ignored the "substantial relationship" test by reasoning that under Rule 1.12, a "matter" must involve the exact "same" transaction or legal dispute. *App.* at 4a.

The CAAF's narrow interpretation of "matter" contradicted the purpose of the rules. JAGINST 5803.1B, Rule 1.5, comment 2, states that "if there is any question of whether the case concerns the same matter, the presumption should be that it is the same matter." The CAAF also ignored the rule that in conflict of interest cases, the presumption should be disqualification. "In determining whether to disqualify counsel for conflict of interest," said the Fourth Circuit, "the trial court is not to weigh the circumstances 'with hair-splitting nicety' but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing 'the appearance of impropriety,' it is to resolve all doubts in favor of disqualification."[16]

Col. Kohlmann did not adhere to these conflict rules. He blurred what should be distinct roles in our adversarial system. Changing roles undermines the public's respect for the justice system – which is the underlying purpose of the Model Rules.

Col. Kohlmann should have recused himself from providing pretrial or posttrial recommendations because he could have used information or opinions acquired in his former position as judge to

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[16] *United States v. Clarkson*, 567 F.2d 270 (4th Cir.1977)(fn. 3)(citations omitted).

Moorefield's disadvantage. He had knowledge and formed opinions not available to the general public or to a similarly situated SJA.

Other SJA conflict cases should have guided Col. Kohlmann to disclose his prior role and to recuse himself.[17] SJAs should err on the side of caution. But Col. Kohlmann did not.

State Bar Associations also interpret Rule 1.12 in a way that would require Col. Kohlmann to recuse himself.[18] The Colorado bar precludes a lawyer from acting on matters that he "passed upon" as a judge. The prohibition includes "matters that are *incident to* or derived from matters that came before the lawyer in his capacity as a judge." The Colorado bar urged a "broad reading" of Rule 1.12's prohibition

Rule 1.12 required Col. Kohlmann to recuse himself from participating in Moorefield's second case because it involved the same party and similar issues.

This Court should reverse the CAAF's restrictive reading of Rule 1.12. If failure to disclose has no legal consequence, prior judges will not disclose.[19]

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[17] The CAAF's precedents have emphasized the importance of the SJA's recommendation by granting relief in cases where the SJA was disqualified because of conflicting interests. *See United States v. Lynch*, 39 MJ 223 (CMA 1994); *United States v. Rice*, 33 MJ 451 (CMA 1991); *United States v. Engle*, 1 MJ 387 (CMA 1976).

[18] *See*, for example, Oregon Formal Opinion No. 2005-120 (Oregon State Bar) Conflicts of Interest...Former Prosecutor or Judge; and Colorado Ethics Opinion 45: Representation of Client by Part-Time Judge; Revised 6/16/84; Addendum Issued 1995 (Colorado Bar Association).

[19] This problem is particularly acute in the military context because state bar committees are generally reluctant to pass judgment on the activities of military attorneys, deferring

B. Law, Regulation, and Directive Required Col. Kohlmann to Recuse Himself From Involvement in Moorefield's Second Trial.

Other laws, regulations and directives, besides JAGINST 5803.1B, Rule 1.12, required Col. Kohlmann's recusal.

1. Article 6 of the UCMJ, Required Col. Kohlmann to Recuse Himself.

Even though Moorefield's second case was not literally the "same" case, the two cases overlapped enough to constitute the same case under Art. 6(c), UCMJ. The party, the offense, the location, and the legal theories were the same.

A wooden definition of the "same" case will not work. Such a narrow reading means that every time a charge is dropped or added, or any change to the trial occurs, a "new" case is born. This result is absurd. There must be a cogent way to test for "sameness." Moorefield offers such a test, *infra*.

2. 28 U.S.C. § 455 Required Col. Kohlmann to Recuse Himself.

Section 455 is referred to as "the federal judicial recusal statute."[20]

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instead to military authority. If this Court does not insist on adherence to Rule 1.12, then no other authority likely will.

[20] *See Bieber v. Dep't of the Army*, 287 F.3d 1358, 1362-64 (Fed. Cir. 2002). The SJA recommends which charges filed by the prosecution go to trial, which are dismissed, who serves as a member, whether to approve requests for experts, and

The CAAF erred by not applying 28 U.S.C. § 455 to an SJA. An SJA performs both prosecutorial and judicial functions. An SJA is a federal judge within the meaning of 28 U.S.C. § 455 when he or she acts in a judicial capacity, such as recommending which charges filed by the prosecution go to trial, which are dismissed, who serves as a member, whether to approve requests for experts, reviewing cases for legal error, recommending whether the CA should approve findings of guilt and the sentence or recommending clemency. Col. Kohlmann was thus also a "judge" whose impartiality might reasonably be questioned.

Moorefield urges this Court to adopt Justice Kennedy's approach, which permits a broader basis for disqualification, as stated in his *Liteky* concurrence:[21]

> In matters of ethics, appearance and reality often converge as one. "[J]ustice must satisfy the appearance of justice"; [22] "[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done."[23] I do not see how the appearance of fairness and neutrality can obtain if the bare possibility of a fair hearing is all that the law requires.[24]

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recommends whether the CA should approve findings of guilt and the sentence.

[21] 510 U. S. 540 (1994).

[22] See, *Offutt v. United States*, 348 U. S. 11, 14 (1954).

[23] *Ex parte McCarthy*, [1924] 1 K. B. 256, 259 (1923).

[24] Cf. *Marshall v. Jerrico, Inc.*, 446 U. S. 238, 242 (1980) (noting the importance of "preserv[ing] both the appearance and reality of fairness," which "'generat[es] the feeling, so important to a popular government, that justice has been done'") (quoting

Col. Kohlmann violated this "appearance of propriety" standard. He was serving in a judicial capacity even though he had potentially formed strong views about Moorefield's bad character in the first trial. Impartiality is the central requirement imposed on the judge. 28 U.S.C. § 455 does not require disqualification of a judge only when he has personal knowledge of disputed evidentiary facts concerning the proceeding. *Cf. App.* at 4a.

Col. Kohlmann also owed a unique military duty to abide by an appearance of propriety in a system where judges do not serve for fixed terms and may serially rotate jobs.[25]

3. Closely Related Military Conflicts Demonstrate that Col. Kohlmann was Required to Recuse Himself

The CAAF ignored military precedents from closely related situations where the SJA was required to recuse himself. In *United States v. Finster*,[26] the CAAF found that in light of the critical role assigned by Congress to the SJA in advising the CA, "the failure to obtain a recommendation from a qualified person affected the substantial rights of the accused."[27] Also, in *United States v. Siders*,[28] a conflicted SJA was an unqualified SJA. The *Siders* court held that it was error for a former appellate advocate to offer the convening authority adverse

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Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U. S. 123, 172 (1951)(Frankfurter, J., concurring,).

[25] *Weiss v. United States*, 510 U.S. 163 (1994).

[26] 51 M.J. 185 (C.A.A.F. 1999)

[27] Id. at 188.

[28] 17 M.J. 987 (ACMR 1984),

advice on the same matter. That court disapproved switching of roles by insisting on fairness in the "public perception of military judicial proceedings."[29] Col. Kohlmann violated these principles when he changed roles.

Other CAAF precedents suggest that Col. Kohlmann should have recused himself. In *United States v. Dowty*,[30] the CAAF rejected a SJA's unusual method of soliciting jury members which potentially affected the appearance of fairness of the panel. In *United States v Gutierrez*,[31] the CAAF held that if an SJA testifies as a witness, he may be disqualified from serving as SJA in that case.

The line of precedents pointing toward recusal does not stop. In *United States v Taylor*,[32] the CAAF held that an article in the base newspaper expressing a negative view of the accused and his rehabilitative potential could be imputed to the SJA. He then could not perform the duties entrusted to a neutral SJA because he had prejudged the appropriateness of clemency in the case.

In *United States v Butcher*,[33] the CAAF held that RCM 902(a) also governs the disqualification of military judges based on the appearance of bias.[34]

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[29] 17 M.J. 986, at 987. *See also, United States v. Lynn*, 54 M.J. 202 (C.A.A.F. 2000), ("insidious specter amounting to an impermissible appearance").

[30] 60 MJ 163 (C.A.A.F. 2004).

[31] 57 MJ 148 (C.A.A.F. 2002).

[32] 60 MJ 190 (C.A.A.F. 2004).

[33] 56 M.J. 87 (C.A.A.F. 2002) (an accused has a constitutional right to an impartial judge).

[34] The CAAF reasoned that enforcement of RCM 902(a) is necessary to maintain public confidence in the judicial system by avoiding even the appearance of partiality and that such enforcement enhances confidence in the fairness of the

The CAAF noted that military judges must be particularly sensitive to applicable standards of judicial conduct.

Despite these military standards, Col. Kohlmann did not seem sensitive to how the public would perceive his decision to stay involved in Moorefield's second trial. Most precedents pointed to recusal.

4. R.C.M. 1106(b) Required Col. Kohlmann to Recuse Himself

The CAAF erred by not discussing the principles underlying R.C.M. 1106(b). While the restriction here applies to the "same" case, the CAAF erred by suggesting that the rule, by omission, envisions a corollary which affirmatively permits a former judge to act as an SJA in a case like Moorefield's. This is unlikely. With a military conviction rate of approximately 95%, the drafters of the rule did not envision the possibility of a second court-martial of the same person, as happened with Moorefield.[35]

C. Moorefield Was Prejudiced By Col. Kohlmann's Failure to Recuse Himself From Involvement in His Second Case.

Col. Kohlmann's failure to recuse himself affected both his recommendation *before* Moorefield's trial and his recommendation *after* Moorefield's trial; Moorefield's trial was structurally tainted. The error

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proceedings because in matters concerning bias, the line between appearance and reality is often barely discernable.

[35] Major Christopher W. Behan, "Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members," Military Law Review, Vol. 176, 2003, pp. 299, 303.

was not harmless with respect to the findings or with respect to the sentence.

1. Prejudice May Be Presumed When Factual Gaps Resulted from Col. Kohlmann's Failure to Receive Moorefield's Informed Consent – These Factual Gaps Should Not Be Held Against Moorefield.

When Col. Kohlmann failed to receive Moorefield's informed consent despite his prior role as judge in Moorefield's first trial, he closed-off important facts from judicial review. Given Col. Kohlmann's duty, any factual gaps should be held against the government, not Moorefield.[36]

Moorefield's rights were violated when there was no disclosure on the record. Defense counsel did not make timely motions for mistrial or demand disqualification of the SJA.[37] Col. Kohlmann had a duty to avoid an appearance of wrongdoing which "the courts are impelled to deplore."[38] There was no hearing about the circumstances surrounding the potential conflict of interest, or any efforts to avoid it.

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[36] See, for example, *United States v. Ginn*, 47 MJ 236, 244 (1997). ("Article 66(c) does not authorize a Court of Criminal Appeals to decide disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties.").

[37] *See United States v. Murphy*, 50 M.J. 4, 10 (C.A.A.F. 1998) (appellant entitled to have military judge settle conflict-of-interest issues on the record); and *United States v. Breese*, 11 M.J. 17, 23 (C.M.A. 1981) (conflict of interest presumed where military judge has not conducted suitable inquiry).

[38] *United States v. McCluskey*, 6 USCMA 545, 550, 20 CMR 261, 266 (1955).

Col. Kohlmann might could have advised or assisted the prosecution with the things he knew. But Moorefield may not be faulted for "speculating" about facts that were not properly disclosed before trial. Col. Kohlmann compelled the speculation.

2. Col. Kohlmann's Failure to Recuse Himself Indicates that He May Have Had an Actual Bias Against Moorefield.

Col. Kohlmann insisted that he stay on Moorefield's second case. His choice was odd.[39]

Col. Kohlmann's refusal to recuse himself was odd because recusal was such a simple alternative. Under military law, issues of actual bias are viewed subjectively, "through the eyes of the (staff judge advocate)."[40] But Col. Kohlmann was determined to stay involved in Moorefield's prosecution.

Col. Kohlmann personally and substantially participated in a week-long, fully contested trial, observing both witnesses and evidence and would have formed opinions about Moorefield's character. He saw evidence at Moorefield's first trial that no later SJA would have. He had memories of

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[39] An SJA may request that another SJA provide advice to a CA or even request that a command other than the one to which the accused is attached refer charges against the accused to a court-martial. Art. 2, UCMJ; R.C.M. 202; R.C.M. 601(b); *United States v. Talty*, 17 M.J. 1127, 1130 (N.M.C.M.R. 1984); *United States v. Kloese*, 24 M.J. 783, 785 (A.C.M.R. 1987). An SJA or a commander may also elevate a matter to the first superior. *See* R.C.M. 401(a); R.C.M. 601(f); *see also United States v. Blaylock*, 15 M.J. 190, 193-94 (C.M.A. 1983).

[40] *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999) (quoting *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996))(applying the actual bias standard to military judges and members).

information not available to the general public or to a similarly situated SJA.

Col. Kohlmann demonstrated his potential bias by negotiating a "hard line" with Moorefield's defense team. He insisted that Moorefield serve a minimum sentence of ten-years.

3. Col. Kohlmann's Failure to Recuse Himself Undermines Public Perception of the Appearance of Fairness in the Military Justice System.

A member of the public would have serious doubts about the fairness of the military justice system if they knew that that a former judge could change roles and later prosecute a member who previously appeared before him.[41]

A member of the public would suspect that a judge forms character opinions and would inevitably import those judgments into advice to prosecute.[42] The public could conclude that Col. Kohlmann bias.

Intermingling military judge duties and SJA duties perpetuates the perception of a rigged process stacked against the accused.

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[41] The public's view of Col. Kohlmann is the legal standard. Under military law implied bias is viewed through the eyes of the public, and the focus is on the perception or appearance of fairness of the military justice system *United States v. New* 55 M.J. 95, 100-01 (C.A.A.F. 2001); *United States v. Wiesen* 56 M.J. 172 (C.A.A.F. 2001)(public perception that the process would be unfair trumped member proclamations that they would be fair); *United States v. Miles,* 58 M.J. 192, 194 (C.A.A.F. 2003); *United States v. Leonard* 63 M.J. 398 (C.A.A.F. 2006).

[42] *See United States v. Zagar*, 5 USCMA 410, 18 CMR 34 (1955)(relying on federal implied bias case law, the court reasoned that "jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments can not always be ascertained.")

The CAAF applies an objective standard which is less deferential than abuse of discretion but more deferential than *de novo*.[43] Implied bias exists when "most people in the same position would be prejudiced."[44] In *United States v. Humpherys*,[45] the CAAF held that an attorney has an ethical duty to identify conflicts of interest concerning the attorney's representation of a client and to take appropriate steps to decline or terminate representation when required by applicable rules, regardless of whether a party-litigant has filed a motion to disqualify the attorney.

Col. Kohlmann took no such steps.

4. Former Judges Must Recuse Themselves or Courts Will Remand the Case Based on the Appearance of Fairness Standard

Most American courts favor disqualification to dispose of issues involving former judges. But the CAAF broke with these precedents.

Typical examples from around the country demonstrate that courts customarily disqualify a former judge from current legal work if it relates in any way with a party the judge previously sat in judgment over.

A former judge may not later prosecute one of his previous defendants. In *State v. Tate*,[46] the Tennessee court found an actual conflict of interest when a judge who had merely heard some motions from the defendant then became the Knox County District

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[43] *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004).
[44] *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996).
[45] 57 MJ 83 (C.A.A.F. 2002).
[46] 925 S.W.2d 548 (Tenn.Crim.App. 1995).

Attorney prosecuting the defendant. The court reasoned that, although a "trial judge does not have the same duties as defense counsel" and there "is a lesser degree of shared confidences," the court felt that "in these particular circumstances, the more cautious approach is to disqualify the office and appoint an entirely new prosecution team. That preserves the integrity of the criminal justice system."

A former judge usually may not deal with the same party. In *Higdon v. Kern,*[47] the California court ruled that a former court commissioner (analogous to the position of a judge in divorce proceedings) was disqualified from participation as an attorney in any matter he had previously participated in as a commissioner. The court stated that "the parties' and the public's perception of impropriety needs to be alleviated by a process which assures that...the former judge...will not receive an unfair advantage."[48]

A former judge usually may not deal with a related matter. In *Cho v. Superior Court of Los Angeles County,*[49] the California court ruled that a prosecutor may not have previously sat in judgment on a *related* matter. The disqualifying issue did not need to be the "same" matter. *Cf. App.* at 4a.

A former judge usually may not deal with a former party as an opponent. In *Chisolm v. Transouth Financial Corp.,*[50] based on the appearance of impropriety, the court disqualified a retired federal judge who resigned to practice at a private law firm

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[47] 227 Cal.App.3d 1667 (Ct.App.Cal. 1991).
[48] *Higdon* at 1678.
[49] 39 Cal.App.4th 113 (Ct. App. Cal. 1995).
[50] 2000 U.S. Dist. LEXIS 8483 (E.D. Va. 2000).

in a case initiated before that judge (now counsel) had retired from the same court. *Cf. Id.* at 4a.

A former judge often may not deal with closely related issues. In *Rennie v. Hess Oil Virgin Islands Corp.*,[51] the court disqualified a prior government commissioner from acting in similar cases when she became a private attorney, even though her involvement in those prior cases was not "personal and substantial." Her disqualification was based on an appearance of impropriety standard; to avoid public skepticism; and to safeguard against the potential harm to the adversary process.

5. The Standard for Prejudice Based on Col. Kohlmann's Error was Low – The Defense Need Only Make A "Colorable Showing of Prejudice."

Col. Kohlmann violated Moorefield's rights by not only providing defective pretrial recommendations; he also provided defective recommendations *after* Moorefield's trial. On his last day on the job, Col. Kohlmann recommended that Moorefield's findings and sentence be approved.

Where post-trial errors occur, the CAAF will order a new review if the defense makes "some colorable showing of possible prejudice."[52]

Moorefield has made a "colorable showing of prejudice," warranting a new hearing. Col. Kohl-

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[51] 981 F.Supp. 374 (V.I. 1997).

[52] *United States v. Wheelus*, 49 MJ 283, 289 (C.A.A.F. 1998); see also *United States v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004) (held that a disqualified staff judge advocate's participation in the post-trial review process is a serious deficiency, "by definition, assessments of prejudice during the clemency process are inherently speculative."

mann made a mistake when he declined to recuse himself from involvement in Moorefield's prosecution. This Court should reverse.

This Court should protect the integrity of the criminal justice system by deterring the participants in a criminal trial from later switching roles in matters involving the same defendant. This Court should not tolerate "musical chairs" in American courtrooms.

II. A Defendant In A Criminal Trial Has the Right to Access Transcripts from His First Trial If the First Trial Affects His Second Trial – A Right Denied to Moorefield.

This Court should vindicate its line of holdings that a criminal defendant has a due process right to a transcript from a previous trial if the matters in the first trial have an effect on his second trial.

Moorefield's due process right to a transcript from his first trial was denied during the lengthy appellate delay when the audio-tapes from the first trial were destroyed. The destruction of tapes denied him a vital instrument in his appeal. Both NMCCA and the CAAF relied on Moorefield's failure to prove prejudice as a basis for deciding the case against him. *App.* at 4a,5a,9a,10a. Yet these conclusions fly in the face of this Court's transcript precedents.

Moorefield invokes this Court's precedents that a defendant possesses the right of access to court-transcripts.[53] When the defendant's grounds for

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[53] *See Griffin v. Illinois*, 351 U. S. 12 (1956); *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958); *Draper v. Washington*, 372 U. S. 487 (1963); *Mayer* v. *City of Chicago*, 404 U.S. 189 (1971).

appeal make out a colorable need for a complete transcript, as here, the government has the burden of showing that only a portion thereof or an "alternative" will suffice for an effective appeal on those grounds.[54]

In this case, the first trial transcript would document how Col. Kohlmann obtained "specialized knowledge" as judge in the course of the first trial and any comments that he made. But these tapes were destroyed. *App.* 10a,11a.

This Court should overrule the CAAF's specific reliance on Moorefield's failure to prove prejudice because the government obliterated his only chance to do so. *Id.* at 3a-4a. The government improperly shielded itself from review by both delaying Moorefield's appeal and then destroying the audio-tapes by the time his case was docketed for an appeal. No transcript from the first trial was therefore available to review. *App.* at 7a,8a,9a.

The finding below that the lengthy posttrial appellate delay was not harmless beyond a reasonable doubt was clearly erroneous. The delay was harmful to Moorefield because he lost the most critical instrument in his appeal: the transcripts from his first trial.

The government denied Moorefield's due process rights. This Court should reverse.

III. This Court Should Resolve a Conflict in the Circuits Over the Definition of "Matter" and Over How and When to Apply

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[54] *Mayer* at 195; *See* in *Britt v. North Carolina*, 404 U.S. 226 (1971), the approval of *United States ex rel. Wilson v. McMann*, 408 F.2d 896, 897 (2d Cir. 1969).

the "Substantial Relationship" Test – A Test that Decides this Case.

This Court should grant this petition to resolve a conflict among the courts of appeals. The circuits split in how they analyze conflict of interest issues.

The courts of appeals differ in how they apply limitations prohibiting a lawyer from continuing to work on former matters, including how they interpret the ABA's Model Rules of Professional Conduct, Rules 1.7 through 1.12. These rules generally warn that a conflict of interest arises when a lawyer who has engaged in previous legal work later performs other legal tasks that are "the same or a substantially related matter." Rule 1.9.

The definition of "matter" and the "substantial relationship" test are key to Moorefield's case because this Court must determine if Col. Kohlmann's prior and later legal roles were "personally and substantially" related under Rule 1.12.

In general, the federal courts have adopted the Model Rules as the national standard governing attorneys and their disqualification. But this raises yet another conflict among the courts of appeals. The Second Circuit believes that it is not the function of a court "to act as a general overseer of the ethics of those who practice ...unless the questioned behavior taints the trial." *W.T. Grant Co. v. Haines,* 531 F.2d 671, 677 (2d Cir. 1976). But this narrow approach has been rejected by a majority of the other circuits.[55]

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[55] *See, e.g., In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992); "[f]ederal courts may adopt state or ABA rules as their ethical standards, but whether and how these rules are to be applied are questions of federal law." *Id.* at 610. *American*

There are three primary tests for "substantial relationship" used throughout the country. *See Chrispens v. Coastal Refining & Marketing, Inc.*, 257 Kan. 745, 897 P.2d 104, 111 (1995).

The first approach compares the facts of the former and current legal work. The Fourth, Sixth, Eighth and Ninth circuit courts of appeals tend to follow this approach.

The second approach, insists that the issues involved in the two roles be identical or essentially the same. It is the narrowest approach. This approach was adopted by the Court of Appeals for the Armed Forces (CAAF) in Moorefield's case. The First, Second, Tenth and District of Columbia courts of appeals tend to follow this approach.

The third approach to analyze a "substantial relationship," was developed by the Seventh Circuit Court of Appeals in *Westinghouse Elec. Corp. v. Gulf Oil Corp.*[56] Moorefield urges this Court to adopt this test. It blends the fact and issue comparisons into a multi-step test, discussed *infra*. Both the Fifth and Third Circuit court of appeals use similar tests.

This Court should adopt the Seventh Circuit's test for a substantial relationship so that a serious error that could undermine the public's trust in our judicial system, like a former judge later prosecuting the same defendant, will never happen again.

Airlines rejected the notion that conflicts of interest may be left to bar authorities in the absence of actual prejudice, observing that federal courts have a right and a duty to preserve the integrity of the practice of law before them. *Id.*, at 610-11; *See, also, Cole* v. *Ruidoso Municipal Schools*, 43 F.3d 1373, 1383-84 (10th Cir. 1994); *Havens v. Indiana*, 793 F.2d 143, 145 (7th Cir. 1986); *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 161-62 (3rd Cir. 1984).

[56] 588 F.2d 221 (7th Cir.1978).

The Second Circuit established the "substantial relationship" test[57] for situations dealing with disqualifications in the context of successive representations – a test that is now reflected in the black letter text of the Model Rules.

The "substantial relationship" test is crucial; once proved, an irrebuttable presumption arises that facts were revealed that require disqualification."[58]

A. THE "FACTS" TEST. SOME CIRCUITS COMPARE THE FACTS OF THE PREVIOUS AND LATER LEGAL WORK TO SEE IF THERE IS A "SUBSTANTIAL RELATIONSHIP"

An example of the "facts" approach to questions of conflict arose in the Ninth Circuit. That court noted and approved the *personal* recusal of a former judge in *County of Los Angeles v. District Court (Forsyth),* 223 F.3d 990 (9th Cir. 2000), although not requiring the law firm be disqualified by imputation.[59]

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[57] *T.C. Theatre Corp. v. Warner Bros Pictures Inc.*, 113 F. Supp. 265 (SDNY 1953), aff'd, 216 F.2d 920 (2d Cir 1954).

[58] *Bodily v. Intermountain Health Care Corp.*, 649 F. Supp. 468, 474 (D. Utah 1986); *see also Houghton v. Dep't of Health,* 962 P.2d 58, 61 (Utah 1998).

[59] In *Forsyth*, five years earlier, while on the bench, former U.S. Magistrate Judge J. Reichman presided over settlement negotiations in a police brutality case against the Los Angeles County sheriff's department. Attorney S. Yagman brought another police brutality case, involving a *different* plaintiff, against the County. While the second, unrelated case was progressing, Reichman retired and joined Yagman's firm as a partner. A week before the judge joined the firm, Yagman removed all files concerning the second case to his home, and instructed his partner M. Yagman not to discuss the case with Reichman. Reichman, as a former judge, and consistent with Rule 1.12, did not work on the second unrelated matter.

Here, a "substantial relationship" is determined on a case-by-case basis by looking at the facts.

B. THE "ISSUES" TEST. SOME CIRCUITS INSIST THAT THE PREVIOUS AND LATER LEGAL WORK INVOLVE THE EXACT SAME ISSUE FOR THERE TO BE A "SUBSTANTIAL RELATIONSHIP"

The lead case for the narrow interpretation of conflict of interest rules, such as those found in Rules 1.9 through 1.12, is *Poly Software Int'l. v. Yu Su*, 880 F. Supp. 1487 (D. Utah 1995), in the Tenth Circuit, where the court interpreted the term "matter" to mean a particular "judicial or other proceeding ...involving a specific party or parties." *Id.* at 1492.

In *Poly Software,* two companies, Micromath and Polysoft Partnership, had used an attorney-mediator to mediate a copyright dispute. A few years later, Messrs. Su and Wang, formerly partners in Polysoft Partnership, had parted company and were suing each other in a copyright infringement action similar to the earlier matter. To represent him, Mr. Wang retained the same lawyer who had mediated between

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Despite Reichman's recusal, the County moved to disqualify his firm, on the ground that he had received confidential information about the County in the first case, and that the entire firm was therefore vicariously disqualified. The district court denied the motion, and the Ninth Circuit affirmed. Assuming that the two brutality cases were "substantially related," and that Reichman received confidential information – which would disqualify him personally from handling the second case – the "ethical wall" Yagman built between Reichman and the second case rebutted the presumption that his knowledge contaminated the firm.

Micromath and Polysoft Partners. The court disqualified the attorney and his firm.

Poly Software represents the narrowest approach to defining "matter" and in applying the "substantial relationship" test for two reasons.

First, *Poly Software* is narrow because it requires a showing that the current attorney received confidential information in his or her former role *before* triggering the "substantial relationship" test.

Second, *Poly Software* is narrow because it defines a "matter" narrowly as a particular, discrete legal controversy. In this case, the CAAF relied on the narrow *Poly Software* approach to conclude that (1) there was no evidence that Col. Kohlmann, as the former judge, receiving any confidential information or other "specialized knowledge," thus not even triggering the "substantial relationship" test; and (2) the two trials were different enough so as not to be the "same" case or matter. *Id.* at 3a, 4a.

The D.C. Court of Appeals follows the narrow approach reflected in *Poly Software*. In *Van Ee v. Environmental Protection Agency*, 202 F.3d 296 (DC Cir. 2000), the DC Court of Appeals determined that a former EPA lawyer's proposed environmental advocacy did not involve a "covered matter" because it did not involve "interests of discrete and identifiable persons or entities." *Id.* at 302. This approach, similar to the CAAF's below, is the narrowest test for a "substantial relationship."

C. The "Facts and Issues" Test. The Blended Approach Developed by The Seventh Circuit is the Best Method to Determine If the Facts and Issues of

PRIOR AND LATER LEGAL WORK CONSTITUTE A "SUBSTANTIAL RELATIONSHIP."

Moorefield urges this Court to adopt the Seventh Circuit's reasonable blend of fact and issue comparisons set forth in *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir.1978). It is useful as a step-by-step test to determine whether a "substantial relationship" exists between the prior and current legal work.

A related case, *Chrispens v. Coastal Refining & Marketing, Inc.*, 897 P.2d 104 (Kan 1995) expands on the test with a short, non-exclusive list of six factors that courts following the Seventh Circuit approach have considered in determining whether a substantial relationship exists. *Chrispens* at 112.

If the CAAF had used any of these factors, it would have disqualified Col. Kohlmann. The factors include: (1) the case involved the same client and the matters or transactions in question are relatively interconnected or reveal the client's pattern of conduct; (2) the lawyer had interviewed a witness who was key in both cases; (3) the lawyer's knowledge of a former client's negotiation strategies was relevant; (4) the commonality of witnesses, legal theories, business practices of the client, and location of the client were significant; (5) a common subject matter, issues and causes of action existed; and (6) information existed on the former client's ability to satisfy debts and its possible defense and negotiation strategies. *Id.* (citations omitted). In some cases, *one factor*, if significant enough, can establish that the subsequent case is substantially related. *Id.* In the Seventh Circuit, careful review of the facts at hand in relation to these six factors provides a specific

framework for resolving conflict cases like the Moorefield case.

If the CAAF had applied the Seventh Circuit's more sophisticated test for a "substantial relationship," it would have concluded, for example, that the case involved the same client and the matters in question were "relatively interconnected" and revealed the client's "pattern of conduct"; that there was a "commonality of witnesses [and] legal theories;" and that there was a "common subject matter, issue and cause of action." But, instead, the CAAF insisted that the two matters be *exactly* the "same." This was error.

The Third Circuit court of appeals also follows a balancing approach in evaluating whether there is a "substantial relationship" between former and new legal work. The lead Third Circuit case is *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, (3d Cir. 1984).[60]

In *Corn Derivatives*, the Third Circuit concluded that the prejudice to former clients would be too great to justify counsel's continued representation of the objector. *See Id.* at 162. The Third Circuit focused on the policies underlying the rules against an attorney representing a party in a matter in which a former client was now an adversary, including preventing "even the potential that a

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[60] In *Corn Derivatives*, the Third Circuit granted a motion to disqualify an attorney who had formerly represented several class representatives; some of the class representatives approved of a proposed settlement and others did not. Counsel had withdrawn from representing the parties approving of the settlement and sought only to represent one objector on appeal. After consulting the relevant portions of the ABA's Model Rules of Professional Conduct and Model Code of Professional Responsibility.

former client's confidences and secrets may be used against him"; maintaining "public confidence in the integrity of the bar"; and upholding the duty of loyalty that a client has the right to expect. *Id.* These policy principles would also obtain in Moorefield's case.

In *United States v. Miller*, 624 F.2d 1198 (3d Cir. 1980), the Third Circuit affirmed the disqualification of a lawyer under New Jersey rules who had helped prepare the criminal case against his client while he was employed as an assistant U.S. attorney.

The Fifth Circuit also uses a similarly nuanced test. The lead case is *In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992).[61] Under its version of the "substantial relationship" test, the Fifth Circuit directed that a former attorney be disqualified, even without "switching sides."

Col. Kohlmann was not required to hold Moorefield's confidences under the Fifth Circuit's approach. It held that "the substantial relationship test cannot be reduced to a confidentiality rule..." *Id.* at 619. In contrast, the CAAF specifically looked to whether Col. Kohlmann had obtained confidences from Moorefield when he served as a judge at his first trial. *App.* at 3a, 4a. This was error.

D. OTHER TESTS

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[61] Cert. denied sub nom *Northwest Airlines, Inc. v. American Airlines, Inc.*, 507 U.S. 912, 113 S. Ct. 1262, 122 L. Ed. 2d 659 (1993). In *American Airlines*, Vinson & Elkins agreed to defend its long-time client, American Airlines, in an anti-trust lawsuit brought by Continental Airlines. The following day, American brought a related suit against Continental and Northwest Airlines. Vinson thereafter declined its representation of American, and brought a third related suit against its former client on behalf of Northwest.

ALL STATES AND SOME CIRCUITS SOMETIMES USE THE "APPEARANCE OF IMPROPRIETY" AND "PUBLIC CONFIDENCE" TESTS, WHICH DO NOT REQUIRE A SHOWING OF PREJUDICE.

Some courts occasionally deal with potential conflicts of interest by bypassing the "substantial basis" test entirely and disqualify counsel based on the "appearance of impropriety" or based on "public confidence." These tests would also disqualify Col. Kohlmann.

Col. Kohlmann made a mistake; he should have recused himself from Moorefield's prosecution. This Court should take Moorefield's case to announce it will no longer permit lawyers to play "musical chairs" in American courtrooms.

CONCLUSION

Sergeant Moorefield respectfully requests the Court grant this petition for a writ of certiorari.

Respectfully submitted,

DARRIN W.S. MACKINNON*
Lieutenant, JAGC
U.S. Navy Reserve
**Counsel of Record*

14232 Catbird Drive
Gainesville, VA 20155
(703) 930-5161

June 2008

Appendix A

UNITED STATES, Appellee

v.

Daqric B. MOOREFIELD, Sergeant
U.S. Marine Corps, Appellant

No. 07-0503

Crim. App. No. 200600162

United States Court of Appeals for the Armed Forces

Argued March 10, 2008

Decided April 1, 2008

PER CURIAM

Counsel

For Appellant: Lieutenant Gregory W. Manz, JAGC, USN (argued); Lieutenant Darrin W. S. MacKinnon, JAGC, USNR (on brief).

For Appellee: Colonel Louis J. Puleo, USMC (argued); Commander Paul C. LeBlanc, JAGC,

USN, and Major Tai D. Le, USMC (on brief); Major Kevin C. Harris, USMC.

Military Judge: M. B. Richardson

PER CURIAM:

A general court-martial composed of officers and enlisted members convicted Appellant, contrary to his pleas, of one specification of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907 (2000);[1] one specification of insubordination toward a noncommissioned officer, in violation of Article 91, UCMJ, 10 U.S.C. § 891 (2000); one specification of attempting to strike a military policeman in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2000); five specifications of assault in violation of Article 128, UCMJ; and one specification each of disorderly conduct, soliciting crime, communicating a threat, and impersonating a noncommissioned officer, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2000). The members sentenced Appellant to a bad-conduct discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the sentence and credited Appellant with 324 days for

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[1] It is directed that the promulgating order be corrected to reflect that Appellant pled not guilty to Charge I, Specification 1 (as reflected in the Record of Trial at 59).

pre-trial confinement. The United States Navy-Marine Corps Court of Criminal Appeals (CCA) affirmed. United States v. Moorefield, No. NMCCA 200600162 (N-M. Ct. Crim. App. Dec. 19, 2006) (per curiam) (unpublished).

DISCUSSION

The staff judge advocate (SJA) in this case, Colonel (Col.) K, served as the military judge in an earlier, unrelated courtmartial of Appellant. Appellant argued that Col. K should have been disqualified because his participation in the second courtmartial violated Rule for Courts-Martial (R.C.M.) 1106, Article 6, UCMJ, 10 U.S.C. § 806 (2000), and 28 U.S.C. § 455 (2000), and required recusal.

The CCA rejected this argument. It recognized that R.C.M. 1106(b) and Article 6, UCMJ, bar a person from participating as the SJA in the same case that he served as a military judge, but held that because Appellant had not shown that the two trials in which Col. K was involved were the same case, R.C.M. 1106(b) and Article 6, UCMJ, did not apply. Moorefield, No. NMCCA 200600162, slip. op. at 3. We agree.

Appellant's courts-martial occurred several years apart and involved different victims and evidence. And Appellant points to no specialized knowledge obtained by Col. K in the course of the

first court-martial, or knowledge of disputed evidentiary facts in the second court-martial on the part of Col. K.[2]

Moreover, Appellant has not shown that anything Col. K, as SJA, did or did not do in the course of the second court-martial prejudiced him. Under the facts of this case, Col. K acted as SJA and military judge in cases involving Appellant that were neither the same case for purposes of R.C.M. 1106 or Article 6, UCMJ, nor the same matter, for purposes of Dep't of the Navy, Judge Advocate General Instr. 5803.1B, Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General, Rule 1.12 (Feb. 11, 2000).

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

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[2] Thus, even assuming without deciding that 28 U.S.C. § 455 (2000), which pertains to the disqualification of federal justices, judges, and magistrates as defined in 28 U.S.C. § 451 (2000), extends to an SJA, it did not require Col. K to disqualify himself.

Appendix B

IN THE
U.S. NAVYMARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

D.A. WAGNER R.E. VINCENT E.B. STONE

UNITED STATES

v.

Daqric B. MOOREFIELD
Sergeant (E-5), U. S. Marine Corps

NMCCA 200600162 Decided 19 December 2006

Sentence adjudged 09 December 2004. Military Judge: M.B. Richardson. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, Cherry Point, NC.

LT DARRIN MACKINNON, JAGC, USN,
Appellate Defense Counsel
Maj KEVIN HARRIS, USMC,
Appellate Government Counsel

PER CURIAM:

The appellant was tried by a general court-martial consisting of officers and enlisted members. Contrary to his pleas, the appellant was convicted of disrespect toward a noncommissioned officer, making a false official statement, six specifications of assault consummated by a battery, including assault on a military police staff sergeant, wrongfully soliciting obstruction of justice, communicating a threat, impersonating a noncommissioned officer, and disorderly conduct, in violation of Articles 91, 107, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 907, 928, and 934. The members sentenced the appellant to confinement for two years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. After considering the record of trial, the appellant's two assignments of error, and the Government's response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

The appellant raises two assignments of error. In his first assignment of error, the appellant asserts that his right to a speedy post-trial review was materially prejudiced by the unreasonable delay in the post-trial processing. The

appellant's second assignment of error contends that the staff judge advocate provided defective Article 34, UCMJ, advice and a defective staff judge advocate's recommendation because he had served as the military judge in a previous court-martial involving the appellant.

We have carefully reviewed the record of trial, the appellant's two assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Post-Trial Delay

As a general matter, we are free to dispose of a due process issue by making an initial determination that any error is harmless beyond a reasonable doubt under the circumstances of an individual case. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006)("As a general matter, we can dispose of an issue by assuming error and proceeding directly to the conclusion that any error was harmless."); *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006)("[I]n cases involving claims that an appellant has been denied his due process right to speedy post-trial review and appeal, we may look initially to whether the denial of due process, if any, is harmless beyond a reasonable doubt."). In determining whether the

error is harmless beyond a reasonable doubt, we are to apply a totality of the circumstances test and consider all of the relevant facts before us *de novo*. *United States v. Toohey,* 63 M.J. 353, 363 (C.A.A.F. 2006). Having done so in this case, we easily conclude that even assuming that a due process violation has occurred, such violation was harmless beyond a reasonable doubt. In reaching this conclusion, we have considered, among numerous other factors, that we can find no evidence of actual harm or specific prejudice flowing from the delay. We recognize that the appellant claims that he has suffered anxiety and difficulty finding a job due to the unresolved status of his appeal. We, however, reject both claims as unsubstantiated in that there is no actual evidence from any of the putative employers listed in the appellant's affidavit that they would have offered the appellant employment regardless of his court-martial convictions. In particular, we note that it is highly unlikely that a security firm would offer the appellant employment with full knowledge of his numerous convictions for violent assault and battery, including battery against a military police officer in the line of duty, and his offenses against authority including making a false official statement to a Naval Criminal Investigative Service agent and solicitation of another to obstruct justice.

We are also required to determine, in every case before us, what findings and sentence should be approved based on all the circumstances in the

record, including the delay in post-trial processing. Art. 66, UCMJ. We have published the factors we consider in making such a determination. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). Having considered these factors, including the post-trial delay in this case, we conclude that the findings and sentence, as approved by the convening authority, should not be disturbed.

Military Judge as Staff Judge Advocate

The staff judge advocate in the appellant's present case, Colonel (Col) R. Kohlmann, USMC, presided five years earlier, as the military judge over a special court-martial of the appellant in which the appellant had been acquitted of all charges. The appellant now claims for the first time on appeal that Col. Kohlmann's participation as staff judge advocate in the present case is in contravention of RULE FOR COURTS-MARTIAL 1106(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), which states "[n]o person who has acted as . . . military judge . . . may later act as a staff judge advocate . . . to any reviewing authority in the same case." The appellant also claims that Col Kohlmann's participation was in contravention of 28 U.S.C. 21 § 455 (Disqualification of justice, judge, or magistrate judge) which requires disqualification of a federal judge where he has personal knowledge of disputed evidentiary facts concerning the proceeding. We

disagree. The appellant presents no evidence that the previous court-martial which resulted in acquittal is the same case that he is now appealing. Further, the appellant provides no authority for his implied proposition that federal regulations pertaining to the conduct of federal judges apply to staff judge advocates. Finally, it is abundantly clear from a plain reading of R.C.M 1106(b) that the Rule fully anticipates that military judges will later serve as staff judge advocates, and further informs us that they are only prohibited from doing so in cases where they actually served as the military judge. This assignment of error is wholly without merit.[1]

Conclusion

The findings and sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

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[1] We note with displeasure the following unsupported claim in the appellant's brief and assignments of error. "[The military judge] studied the Appellant's history . . . in non-public court-martial sessions. . .". Appellant's Brief at 2. Such an outrageous claim by an appellate defense attorney simply must be supported in fact or it will be deemed frivolous, as it has been here.

Appendix C

Court Reporter
Legal Services Support Section
Combat Logistics Regiment 27
2d Marine Logistics Group
Camp Lejeune, NC 28546

Sir,

No, [our office] does not have any [records] for Lance Corporal Daqric B. Moorefield, USMC, in 1999.

Our records go back at least eight years in our database.

Any audio recordings done before April of 2001 for any proceedings were done using audio tapes. After April 2001, we started using digital recordings on CDs. All audio tapes were destroyed mid-2006, and we have no record of them.

[Our office] does cover the MCAS New River, NC, cases. They do fall under the 2d Marine Aircraft Wing, and that is up at MCAS Cherry Point, NC. But since we are geographically closer, and we have more reporters, we do cover 99.99% of their courts that go over at MCAS New River.

Sergeant Leslie E. Johnson

Appendix D

Review Section
Joint Law Center
Marine Corps Air Station New River
Jacksonville, North Carolina 28545-1001

Sir,

The information provided by Sgt Johnson is correct. The Joint Law Center at New River maintains no audio recordings of any trial held on the air station.

The Joint Law Center has no court reporters attached to this command and all reporters come from Camp Lejeune or Cherry Point and take the recordings with them when they leave for transcription purposes.

There is no data on Marine Corps Air Station New River as it relates to the Moorefield case.

Kevin Gannon